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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

ROBERT LaFONTAINE,
Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

Does the language of the Railway Labor Act, 45 USC § 153 (q), preclude judicial review of constitutional due process violations?

II

Does the language of 45 USC § 153 (q) and of the agreement between the United Transportation Workers Union (UTU) and the Chesapeake and Ohio Railway Company (C&O) mandate the production of necessary witnesses and evidence by Public Law Boards and provide the subpoena power for their production?

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OPINIONS BELOW

The order of the Court of Appeals is unreported and is printed in the attached appendix at p.A1.

The order of the district Court is unreported and is printed in the attached appendix at p.A5.

The order of the Court of Appeals, previous appeal by Defendant, is unreported and is printed in the attached appendix at p.A8.

The first order of the District Court is unreported and is printed in the attached appendix at p.A10.

The orders of the Public Law Boards 120 and 120A are printed in the attached appendix at pgs.A17 and A20 respectively.

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on December 15, 1982. (Appendix p.A1) This petition is therefore timely.

This Court's jurisdiction is invoked under 28 USC §1254 and Rule 19 of the Rules of this Court.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

45 USC § 153 First (q):

> "The court shall have jurisdiction to affirm the order of the division or set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's

jurisdiction, or for fraud or corruption by a member of the division making the order."

45 USC § 153 First (j):

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

45 USC § 153 First (k):

Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, that except as

provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided."

Agreement between C&O and UTU Section 8:

"The Special Board shall hold hearings on each claim or grievance submitted to it and due notice of the hearings shall be given. At such hearings the parties may be heard in person, by counsel, or by other authorized representatives as they may select. The parties may present, either orally or in writing, statements of fact, supporting evidence and data and argument as to their position with respect to each case being considered by the Special Board. The Special Board shall have authority to request the production of additional evidence from either party." (emphasis added)

Agreement between C&O and UTU Section 9:

"The Special Board shall make findings of fact and render an award on each case submitted to it, ..." (Agreeement, pp 3,4)

STATEMENT OF THE CASE

This case arises under the Railway Labor Act, 45 USC § 153, First and Second. Petitioner (Plaintiff) was discharged from his employment for participating in an altercation with a fellow employee. He was stabbed by his co-worker and suffered a serious wound.

Pursuant to Article 16; Discipline, of the labor agreement between the United Transportation Union (UTU) and The Chesapeake and Ohio Railway Company (C&O) a "trainmaster's hearing" was held. This trainmaster's hearing disciplined both participants in the altercation by dismissal. The contract agreement

provides for representation at the hearing by an official of the UTU. Both employees were represented simultaneously by the same union official. Midway through the trainmaster's hearing Plaintiff recognized the inherent conflict of interest of this representation. He asked and was granted permission by the trainmaster for the opportunity to question witnesses on his own. From this point forward in the hearing the union official, allegedly representing Plaintiff, assumed an antagonistic, prosecutorial attitude toward Plaintiff. This attitude was so apparent that it was necessary for the trainmaster to admonish him with regard to it. The trainmaster's hearing was transcribed.

In accord with a further agreement between the UTU and the C&O, under the aegis of the Railway Labor Act, a Public Law Board was

created. This PLB was established to hear appeals from employer decisions on labor grievances. The dismissal ordered by the trainmaster's hearing was appealed by the union to this board. The sole evidence considered at this PLB hearing was the transcribed record of the trainmaster's hearing. Plaintiff was not present at this hearing, he had received no notice, and was represented in absentia by a UTU officer. The PLB in its opinion, designated 120, upheld the dismissal.

Plaintiff appealed to the United States District Court for the Eastern District of Michigan, Southern Division. He asked a for a rehearing on the grounds that he had been denied fundamental due process; that the PLB had violated its own rules and procedures as outlined by statute and contract; and that

he had not received notice of the hearing. The District Court remanded to the PLB for rehearing "on the merits." (District Court order April 30, 1976 p.A10 Appendix)

Defendant appealed to the Sixth Circuit Court of Appeals. That Court upheld the District Court order.

Defendant petitioned the United States Supreme Court for review of the Appeals Court decision. The request for a writ of certiorari was denied.

The case was reheard by the PLB. Plaintiff, represented by counsel, asked the board to require the production of certain items of evidence and certain witnesses under Defendant's control. Plaintiff asserted that the evidence and testimony he asked to have produced would presumably directly contradict the evidence that the PLB had extracted from the transcript of the trainmaster's hearing.

The PLB denied the order to produce this requested evidence as immaterial. The Board again relied on the transcript of the trainmaster's hearing in which Plaintiff was so questionably represented and again upheld Plaintiff's dismissal. (PLB opinion 120A) (Appendix p.20)

Plaintiff appealed to the United States District Court for the Eastern District of Michigan, Southern Division. Plaintiff alleged a violation of due process by reason of the PLB's reliance on the transcript of a fundamentally unfair hearing and by reason of the PLB's violation of statutory rules and contractual regulations. The District Court recognized the unfairness of the trainmaster's hearing and wrote that "the proceeding was arguably tainted by dual representation." The Court also recognized, if by implication, its right to due process

review when it wrote: "It would have been unfair to base an opinion on the transcript without giving the Plaintiff the opportunity to submit additional evidence." (District Court Memo Opinion Nov. 8, 1982 p.A5 Appendix) The Court reinforced the notion of its right to due process review in the above Memorandum Opinion when it wrote: "The Plaintiff had a fair hearing, and the issue was lost." The District Court upheld the second PLB decision.

Plaintiff appealed this decision to the Sixth Circuit Court of Appeals. Plaintiff alleged due process denial by reason of fundamental unfairness and violation of statutory provisions. Plaintiff argued that the Sixth Circuit had authority to review on the basis of alleged due process denial. The Appeals Court upheld the lower Court order resting its decision on an interpretation of Union

Pacific Railroad v. Sheehan, 439 US 89 and read that decision as banning any review except for the statutorily enumerated reasons.

Plaintiff now seeks review of the Court of Appeals' decision and its order of December 15, 1983 denying Petitioner's appeal.

ARGUMENT

Petitioner, Robert LaFontaine, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the order entered December 15, 1983 in Case No. 82-1864, entitled Robert LaFontaine, Plaintiff-Appellant v. The Chesapeake and Ohio Railway Company, Defendant-Appellee and the order of that court denying Petitioner's appeal of a district court judgment.

An important question of federal law has been decided by the Sixth Circuit in a manner that is in conflict with applicable decisions

of this Court. Plaintiff in the instant case has been denied remedy on the basis of a literal, though mistaken, interpretation of this Court's opinion in Sheehan. The Court of Appeals recognized "that the Sheehan opinion is susceptible to several interpretations" (Opinion of 12/15/83, p. 2), (Appendix p.A1) it, however, chose to rest its decision on United Steelworkers of America Local 1913 v. Union R.R. Co., 648 F2d 905 (3d Cir. 1981). It read United Steelworkers and its parent Sheehan to mean that statutory limits placed on judicial review of Public Law Board decisions by federal courts precludes those courts from consideration of constitutional violations. Carried to its ultimate conclusion this interpretation would give Congress the right to amend the constitution by legislative fiat. Certainly, this is not the intention of the Sheehan opinion.

The Federal District Court of Vermont found Sheehan more consistent with the long standing assertion by this Court that interpretation of the constitution and of limitation on its granted rights is the sole prerogative of the federal judiciary. Marbury v. Madison,[1] 1 Cranch (1803) In Broth. of Maintenance of Way Employees v. St. Johnsbury & LaMoille County Railway, 512 F Supp 1079 (D Vermont, 1981) the District Court read Sheehan as denying review of a "wide range of purely legal questions" but leaving open the "entirely reasonable practice of the district courts of examining (PLB) decisions for violations of due process."

The Sixth Circuit's recognition of Sheehan's susceptibility to several interpretations and the well thought out opinion of the Vermont District Court diametrically opposed to the choice made by the Sixth

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[1] 512 F Supp 1084; In addition to the statutory bases for review, the Courts have long recognized the jurisdiction

(cont.)

of the district courts to review the proceedings of the NRAB (PLB) for instances of failure to provide due process to the parties to a dispute. (cites omitted) Sheehan is somewhat troubling in this connection since the Tenth Circuit held that the action of the NRAB challenged by the Plaintiff amounted to a violation of due process. The Supreme Court failed to recognize any scope of review beyond the statutory provisions and did not discuss the constitutional basis for Plaintiff's claim. Thus, a possible reading of Sheehan is that a claim that the NRAB failed to provide a due process may not be heard by the district court because unconstitutionality is not among the three narrow bases for review under 45 USC § 153 First (p). The better reading of the Sheehan opinion, however, is that it is largely directed at refuting the Tenth Circuit's suggestion that a wide range of purely legal questions might be open for review by the district court. Sheehan alone is not enough to put an end to the entirely reasonable practice of the district courts of examining NRAB decisions for violations of due process prior to the enforcement of an award. "In sum, this court has four possible bases for review of the NRAB award."

Circuit leaves Plaintiff in a peculiar position. His claim could be heard and a remedy provided in Vermont but he is without remedy in Michigan. This game of geographic roulette with Plaintiff's constitutional rights calls for an interpretation of the rules binding on all parties.

Plaintiff has suffered the loss of a property right on the basis of statutorily mandated procedures. That this loss could not be imposed upon him absent due process is beyond argument. The form of process due is provided by statute and by contract agreement under the aegis of that statutue. But the mere observance of that form cannot be equated with the substantive need for a meaningful hearing. The District Court recognized its right to review the findings of the PLB for violation of Plaintiff's due process: "It is unnecessary for this Court to become involved

in the legal thicket of whether a want of due process is an appealable issue. In this case there was no want of process that was due. The Plaintiff had a fair hearing, and the issue was lost." (Memorandum opinion Nov. 8, 1982 Eastern District of Michigan Southern Div.) (Appendix p.A5) Would the Court have entered this "legal thicket" if it had found that Plaintiff had not received the process due him? If a district court finds that a plaintiff has received adequate due process in a PLB hearing is an Appeals Court precluded from reviewing the lower court's holding on the basis of an interpretation of Sheehan?

In the instant case the issue of due process review presents itself in two ways. Plaintiff suffered a denial of due process on the basis of the PLB decision that rested entirely on a transcript "arguably tainted by dual representation." (Memo opinion 11/8/82 p. 1,2)

(Appendix p.A5) In fact this dual representation is beyond argument. Plaintiff was represented in the contractually organized, statutorily provided "Trainmaster's Hearing" by the same union officer who was simultaneously representing his attacker. (Plaintiff's brief in support of motion to exclude from evidence the transcript of the Trainmaster's hearing). This assertion was uncontroverted by Defendant and recognized as factual by the district court. Plaintiff was denied the right to a meaningful hearing before the PLB when the transcript of this hearing, tainted by dual representation, was the sole evidence upon which the PLB decision was based.

Secondly, the due process denial was compounded by the refusal of the PLB to order the production of evidence and testimony at the second PLB hearing whose function was to

hear Plaintiff's case "on the merits." (District Court order 4/30/76) (Appendix p.A10) Plaintiff's timely request for the forced production of pertinent evidence, pertinent since it would presumably directly contradict the evidence the PLB extracted from the tainted transcript and relied on, was rejected by the PLB as immaterial.

Plaintiff was denied due process in the original hearing on his dismissal. (Trainmaster's Hearing) The denial was compounded when the transcript of the original hearing was the only evidence presented at the first PLB hearing. The District Court, inferentially, accepted its right to review on due process grounds when it wrote that: "The issue of fairness of representation and the use of the trainmaster's hearing transcript can properly be raised at such a hearing" (Memo opinion 2/13/75, p. 3) (Appendix p.A11) and

when it ordered rehearing on the merits.The denial of due process was further compounded when Plaintiff was not permitted to present evidence crucial to his case, at the second PLB hearing.

During oral argument before the Sixth Circuit the Court asked counsel for the Defendant if he believed that the district court order for review on the merits was a valid one. Counsel answered in the affirmative. The Court then asked, parenthetically, if the Appeals Court was denied the right to review a permissible lower court order. This question, though not reflected in the Court's opinion except through its recognition of the several interpretations of Sheehan; the contrary opinion in the Vermont District; and the transcending question of the Judiciary's right of review of constitutional claims, makes weighty argument that a writ of certiorari should be granted.

CONCLUSION

The Sixth Circuit's literal interpretation of statutory language, 45 USC § 153 First (q), and of the Court's opinion in Sheehan raises an important question of federal law, of congressional power and of judicial review. Followed to a logical conclusion, a literal interpretation of Sheehan would grant Congress the right to take property without due process of law.

In Arnett v. Kennedy, 416 US 134, the Court addressed and thoroughly discussed the standard of due process review mandated when government action results in a taking of property. The standard that can be read from Arnett, predecessors and progeny, is a standard of constitutional not statutory review. An interpretation of a statute that grants Congress the power to deny judicial review of

a constitutional claim cries out for the Court's review.

For the above reasons, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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Dated: March 9, 1984

APPENDIX

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed December 15, 1983)

(Robert LaFontaine, Plaintiff-Appellant, v. The Chesapeake and Ohio Railway Company, Defendant-Appellee. No. 82-1864)

BEFORE: ENGEL and CONTIE, Circuit Judges; and POTTER, * District Judge.

PER CURIAM. Robert LaFontaine appeals the district court's judgment upholding the Public Law Board's (the Board's) decision that LaFontaine argues that the Board denied him procedural due process and did not comply with the procedural requirements of the Railway Labor Act. We affirm

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* The Honorable John W. Potter, United States District Court Judge for the Northern District of Ohio, sitting by disignation.

As to LaFontaine's procedural due process claims, we conclude that under the authority of Union Pacific R.R. Co. v. Sheehan, 439 US 89 (1978) (per curiam) and 45 USC § 153(q) this Court cannot entertain such a claim. Section 153(q) provides that the decisions of the Board are conclusive except in three situations: (1) when the Board fails to comply with the requirements of the Railway Labor Act; (2) when the Board exceeds its jurisdiction; and (3) when the Board's decision is tainted by the fraud or corruption of a member of the Board. As the Supreme Court has stated, "this statutory language means just what it says." Sheehan, 439 US at 93. In other words, §153(q) enumerates the only grounds upon which a decision of the Board can be attacked.

Although we recognize that the Sheehan opinion is susceptible to several

interpretations, we find that the best view of Sheehan is represented by United Steelworkers of America Local 1913 v. Union R.R. Co., 648 F2d 905 (3rd Cir. 1981). Where, as here, the Board considers and rejects a procedural due process claim, a court may not review that decision unless one of the three circumstances identified in §153(q) is present in the decision rejecting the due process claim. See id. at 911-12. Accordingly, we may not consider LaFontaine's procedural due process claim.

LaFontaine's second claim is that the Board failed to comply with the requirements of the Act when it declined to exercise its power to command the testimony of certain witnesses requested by LaFontaine. We find nothing in the Act which requires the Board to hear all testimony proffered by a party or to use its power to require the production of witnesses

whenever a party makes such a request. LaFontaine would, therefore, ask us to review what is essentially an evidentiary question. We conclude that the Board's decision not to call certain witnesses was not a failure to comply with the requirements of the Act and that any further inquiry into the propriety of this decision is forbidden under §153(q).

We find no error in the district court's judgment. The judgment is therefore AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed November 8, 1982)

(Robert LaFontaine, Plaintiff, v. The Chesapeake and Ohio Railway Co., Defendant. No. 82-71055)

Cross-motions for summary judgment were taken under advisement at oral argument on October 7, 1982.

An altercation between the plaintiff and a fellow employee occurring on April 26, 1971, led to their discharge by the defendant railroad. The flow of litigation from that time until the present time is long and interesting, but there appears to be no good reason for reciting it here.

The principal issue raised by the complaint is whether the plaintiff had the kind of fair hearing he was entitled to before the Public Law Board (P.L.B.) pursuant to this Court's order of April 30, 1976. The plaintiff

asserts that he did not have a fair hearing for two principal reasons. One reason is that the Board was unfair in considering the transcript of the trainmaster's hearing. The other principal reason involves the Public Law Board's unwillingness to continue the proceedings to subpoena two witnesses at the plaintiff's request.

There was nothing unfair in considering the trainmaster's transcript of the original proceedings. Although the proceeding was arguably tainted by dual representation, it would be almost impossible for witnesses to fairly recall the surrounding circumstances in detail after such a long period of time. It would have been unfair to base an opinion on the transcript without giving the plaintiff the opportunity to submit additional evidence. Under the applicable statute in law, he did have the opportunity to submit

additional written material and was given the opportunity to, and did, testify. Furthermore, he was given the opportunity to, and did, make an offer of proof on what the witnesses would, in his opinion, testify.

It is unnecessary for this Court to become involved in the legal thicket of whether a want of due process is an appealable issue. In this case there was no want of process that was due. The plaintiff had a fair hearing, and the issue was lost.

The Court does not have jurisdiction to consider the merits of the plaiintiff's case de nevo.

An order will be entered granting the defendant's motion for summary judgment.

/s/ James P. Churchill
United States District Judge

Dated: November 8, 1982

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed April 18, 1978)

(Robert LaFontaine, Plaintiff-Appellee, v. The Chesapeake and Ohio Railroad Company, Defendant-Appellant. No. 76-2491)

BEFORE: LIVELY and MERRITT, Circuit Judges; and RUBIN, District Judge.*

The sole issue in this case is whether an employee on whose behalf a union had submitted a claim of wrongful discharge to a Public Law Board created pursuant to the Railway Labor Act was entitled to actual notice of the hearing before the Public Law Board. In Cole v. Erie Lackawana Railway Co., 541 F2d 528 (1976), cert. denied, 433 US 914 (1977), this court held that actual notice of a hearing

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* The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

is required "for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." We conclude that the quoted language is dispositive of this appeal.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ORDER REMANDING CASE TO PUBLIC LAW BOARD

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed April 30, 1976)

(Robert LaFontaine, Plaintiff, v. The Chesapeake and Ohio Railway Co., Defendant. No. 82-71055)

This matter having come on to be heard upon motion of the Plaintiff and the Court being fully informed in the premises:

IT IS HEREBY ORDERED that the decision of the Public Law Board 347 upholding Plaintiff's discharge be set aside and that this matter be remanded to said Public Law Board for rehearing on the merits.

ENTERED BY ORDER OF THE COURT
/s/ Hon. Fred W. Kaess
U.S. District Judge
For
Judge James P. Churchill

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed February 13, 1975)

(Robert LaFontaine, Plaintiff, v. The Chesapeake and Ohio Railway Company, Defendant. No. 74-71397)

This is an action for review of an award made by a special grievance board following the firing of a railroad employee for assaulting another employee. The petition alleges that plaintiff was employed as a yardman in Detroit by defendant railroad. On April 26, 1971, he was involved in an altercation with a fellow employee, J.H. Flatt. Pursuant to railroad procedure, a hearing was held before the trainmaster shortly thereafter; plaintiff was found to be at fault and was discharged from service. A claim for back pay and reinstatement was taken before the Public Law Board #347

pursuant to procedure agreed to by defendant and Plaintiff's collective bargaining representataive, the United Transportation Union. The claim was denied on January 19, 1973.

Plaintiff prays that he be ordered reinstated with back pay, or in the alternative, that the Board's decision be vacated and the matter be remanded for a new hearing. The asserted basis for such relief is that the original hearing was procedurally unfair because the same union representative served both plaintiff and J.H. Flatt at the trainmaster's hearing; that the Public Law Board hearing was unfair in that the transcript of the earlier hearing should not have been relied upon by the Public Board because the trainmaster's hearing had been conducted in total disregard of the rules of evidence; and in that the plaintiff here did

not receive proper notice of the hearing. This last claim was raised only in plaintiff's brief; it does not appear in his complaint.

The defendant railroad has moved for summary judgment alleging lack of jurisdiction over the subject matter as well as failure to state a cause of action. These are both defenses which can be raised by motion to dismiss under [2] Rule 12(b), F.R.C.P. The Court will construe this motion for summary judgment as a motion to dismiss under Rule 12(b)(1) and 12(b)(6).

Defendant claims that jurisdiction to review awards of Special Adjustment Boards does not lie in the district courts. In Andrews v. Louisville & Nashville R. Co., 406 US 320 (1972), it was held that:

"A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent

judicial proceeding. Union Pacific R. Co. v. Price, 360 US 601 (1959)." 406 US at 325. To some extent that principal is modified by the terms of the statute under which Special Boards are created. 45 USC Section 153 provides for jurisdiction in the district court to enforce awards of such boards. The terms of awards may be set aside under the statue only if a party alleges that the order exceeds the scope of the Board's jurisdiction, that the Board failed to comply with statutory requirements, or for fraud or corruption by a member of the Board.

This suit is not for enforcement of an order; nor does it allege any of the three grounds which would put it properly before a district court if enforcement were the issue. Rather, the suit is to set aside an order because of procedural irregularities at both the trainmaster's hearing and the hearing

before tne Special Board. The statute does not authorize review for those purposes. There is, however, case law authority for review of Special Board Decisions where they are tainted rehearing by the Special Board on the grounds of lack of due notice. Under the terms of paragraph 8 of the agreement between the railroad and the union establishing the Special Board, each party to a claim before such Board may present evidence and statements of fact at the hearing before the Board. The issue of fairness of representation and the use of the trainmaster's hearing transcript can properly be raised at such a hearing.

Heretofore, that claim of lack of notice has only been raised in plaintiff's brief. The Court hereby grants plaintiff leave to file an amended complaint to include such a claim. If the amendment is filed within

twenty (20) days of the date of filing of this order, the order granting the motion to dismiss as to the notice claim will be denied. If no such amendment is filed within such time, the motion to dismiss will be granted.

/s/ James P. Churchill
United States District Judge

Dated: February 11, 1975

PUBLIC LAW BOARD 347
AWARD 120

(Members of the Board: JAMES BURKE, Organization Member and B.G. UPTON, Carrier Member)

(Parties to Dispute: United Transportation Union and the Chesapeake and Ohio Railway Company)

(Statement of Claim: Claim for reinstatement of Detroit Yardman R. LaFontaine to the full service of the carrier, and compensation for time lost since June 30, 1971)

The Board, upon the whole record and all the evidence, finds that:

The Carrier and Employees involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute and the parties involved herein, and the

parties were given due notice of hearing.

[2] Claimant was discharged from carrier's service, after investigation, charged with being at fault in an altercation with another employee in violation of rules 801 and 802. The claim is based on an allegation that claimant was not the agressor in the altercation and was only attempting to defend himself. A review of the transcript does not substantiate the claim. Claimant followed the other employee to his automobile, struck him with a lantern, and shouted obscenities at him.

Claimant had been accused of bad work on the job by the other employee. This was not cause to swing a lantern or shout obscenities at the other employee and follow him to his car parked in the opposite direction of

claimant's car.

AWARD: Claim Denied.

ORDER: This award is ordered effective forthwith.

/s/ Arthur W. Sempliner
Judge, Chairman and Neutral

/s/ B.G. Upton
Carrier Member

/s/ J.E. Burke
Organization Member

Dated: January 19, 1973

PUBLIC LAW BOARD 347
AWARD 120A

(Members of the Board: LARRY WOTASZAK, Organization Member; CHARLES J. SCHULER, Carrier Member)

(Judge Arthur W. Sempliner, Chairman and Neutral)

(Parties to Dispute: United Transportation Union and the Chesapeake and Ohio Railway Company)

(Statement of Claim: Claim for reinstatement of Detroit Yardman R. LaFontaine to the full service of the carrier, and compensation for time lost since June 30, 1971)

The Board, upon the whole record and all the evidence, finds that:

The Carrier and Employees involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute and the parties involved herein, and the parties were given due notice of hearing.

On January 19, 1973, Public Law Board 347 denied the claim for reinstatement of Yardman R. LaFontaine as per the copy of the award attached hereto and made a part hereof. On April 19, 1976, U.S. District Judge Fred W. Kaess issued an order as follows:

"It is hereby ordered that the decision of the Public Law Board 347 upholding plaintiff's discharge be set aside and that this matter be remanded to said Public Law Board for rehearing on the merits." The matter was appealed to the 6th Circuit and the following order issued:

"The sole issue in this case is whether an employee on whose behalf a union had submitted a claim of wrongful discharge to a Public Law Board created pursuant to the

Railway Labor Act was entitled to actual notice of the hearing before the Public Law Board. In Cole v. Erie Lackawana Railway Co., 541 F2d 528 (1976), cert. denied, 433 U.S. 914 (1977), this court held that actual notice of a hearing is required "For a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." We conclude that the quoted language is dispositive of this appeal."

Subsequently, certiorari was denied and the matter came on for hearing before the Public Law Board 347 on September 20, 1979. Claimant, Robert LaFontaine, was represented by Ronald Reosti, Reosti and Papakhian, the United Transportation Union having been relieved at the request of the claimant LaFontaine. Mr.

LaFontaine was present in person before the Public Law Board.

The memorandum opinion of U.S. District Judge James P. Churchill is attached, and made a part hereof. Counsel for the claimant has raised two issues as follows:

1. To exclude the transcript of the trainmaster's hearing, as the claimant was not properly represented by officers simultaneously representing claimant LaFontaine and Conductor Flatt. The board denied the position of counsel Reosti in that by virtue of the Railway Labor Act, as amended, a Public Law Board is essentially a review tribunal, and that the transcript had previously been admitted into the record. A review of the transcript indicates that claimant was represented by representatives of his choice, participated in the investigation to an unusual extent,

and appears to have been, interms of jailhouse legalese, perhaps the most knowledgeable person present.

2. A demand for certain witnesses to be produced. The board denied the demand, but allowed a proffer of proof as to what these witnesses could testify to the burden of producing the witnesses being on the claimant, these same witnesses having testified at the trainmaster's investigation.

Claimant LaFontaine was examined by his counsel, Ronald Reosti. A review of the transcript and the testimony of claimant LaFontaine would indicate claimant's testimony was less than reliable. It was further indicated that claimant thought he could direct his work and run the railroad better than his superiors who were charged with this responsibility. Claimant was

argumentative, and in going to his care purposely went out of his way to go near Flatt's car and a fight ensued. Conductor R. Sharron found claimant's gloves on Flatt's car, but not his lamp. Failure to find the lamp with the gloves, substantiates the testimony that the lamp was used to strike conductor Flatt. On Page 39 of the transcsript of the September 20, 1979 hearing of this board, claimant LaFontaine testified that he believes he discussed his case with the committee prior to the original hearing before Public Law Board 347. There was no new evidence presented to the board that will change the board's original denial, and the claim will therefore be denied.

AWARD: Claim Denied.

ORDER: This award is ordered effective forthwith.

/s/ Arthur W. Sempliner
Judge, Chairman and Neutral

/s/ Charles J. Schuler
Carrier Member

/s/ Larry Wotaszak
Organization Member

Dated: April 23, 1982

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1639

ROBERT LAFONTAINE,
Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, The Chesapeake and Ohio Railway Company, by its attorneys, Cross, Wrock, Miller & Vieson, submits its Brief in Opposition to LaFontaine's Petition for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

QUESTIONS PRESENTED

Respondent adopts the Questions Presented as submitted to the Court in the Petition for a Writ of Certiorari.

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OPINIONS BELOW

Respondent adopts the statement of Opinions Below as submitted to the Court in the Petition for a Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondent adopts the Statement of Jurisdiction as submitted to the Court in the Petition for a Writ of Certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Respondent adopts the statements of Statutory and Regulatory Provisions Involved as submitted to the Court in the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

While employed by Respondent, Chesapeake and Ohio Railway Company,[1] Petitioner, Robert LaFontaine, was involved in an altercation on the Respondent's property with J. H. Flatt, a fellow employee, on April 26, 1971. Both Petitioner and Flatt were discharged following a formal "trainmaster" disciplinary hearing which was held on June 22, 1971, pursuant to the Collective Bargaining Agreement between the Respondent and the United Transportation Union ("UTU"), Petitioner's labor representative.

Petitioner unsuccessfully challenged his discharge at each appellate level of the grievance procedure established under the Collective Bargaining Agreement. Thereafter, he filed a claim for reinstatement with Public Law Board 347 ("P.L. Board" or "Board"), which was established by a separate agreement between the Respondent and the UTU, pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. §153 Second.[2] On January 19, 1973, the Board denied Petitioner's claim and upheld his discharge.

Petitioner then filed his first civil action with the United States District Court for the Eastern District of Michigan seeking judicial review of the Board's decision. In an Order dated April 19, 1976, the District Court held that Petitioner had not received the proper advance notice of the P.L. Board

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[1]The Chesapeake & Ohio Railway Company is a wholly owned corporate subsidiary of CSX Corporation. In addition, The Chesapeake & Ohio Railway Company has the following subsidiaries or affiliates: The Baltimore and Ohio Railroad Company, Chicago South Shore and South Bend Railroad, Allegheny and Western Railway Company, The Baltimore and Cumberland Valley Rail Road Extension Company, Cincinnati Inter-Terminal Railroad Company, Clearfield and Mahoning Railway Company, The Cleveland Terminal and Valley Railroad Company, Dayton and Michigan Railroad Company, Dayton and Union Railroad Company, The Home Avenue Railroad Company, and Winchester and Potomac Railroad Company.

[2]45 U.S.C. §153 Second was added to the RLA in 1966 by Pub. L. 89-456. In an attempt to relieve the large backlog of cases pending before the National Railroad Adjustment Board ("NRAB"), this amendment authorized railroads and unions representing their employees to agree to the creation of special arbitration tribunals called "Adjustment Boards" or "Public Law Boards" to make a final and binding resolution of disputes or grievances which were otherwise referable ~~to the NRAB~~. *See* 1966 U.S. Code Cong. and Admin. News, p. 2285.

hearing, as was required by 45 U.S.C. §153 First(j). The Court remanded the case to the P.L. Board to hold a second hearing.

The Respondent appealed the District Court's decision to the Court of Appeals for the Sixth Circuit. On April 18, 1978, the Court of Appeals affirmed the District Court in an Opinion which stated:

> The sole issue in this case is whether an employee on whose behalf a union had submitted a claim of wrongful discharge to a Public Law Board created pursuant to the Railway Labor Act was entitled to actual notice of the hearing before the Public Law Board. In *Cole v. Erie Lackawanna Ry. Co.*, 541 F.2d 528 (1976), *cert. denied*, 433 U.S. 914 (1977), this court held that actual notice of a hearing is required "for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." We conclude that the quoted language is dispositive of this appeal.

On October 30, 1978, this Court denied Respondent's Petition for Writ of Certiorari, and the case was remanded to the P.L. Board to hold a second hearing.

Following the requisite notice to Petitioner, the second P.L. Board hearing was held on September 20, 1979, where Petitioner was represented by an attorney of his own choice. At the commencement of the hearing, the Respondent moved the Board to limit the evidence to be considered at the hearing to the transcript of the trainmaster's hearing which led to the Petitioner's discharge. The Board denied the Respondent's motion, advising Petitioner that it would "receive anything that you wish to submit" (PLB Tr., Respondent's Appendix, p. A12).

The Board then received Petitioner's offer of seven exhibits, consisting of a hand-drawn diagram and six staged photographs taken in September of 1979, showing the railroad parking lot, the scene of the altercation. These were introduced in an effort to support Petitioner's testimony as to the

location of the cars of Petitioner, Flatt and other employees at the time of the altercation in April of 1971 (PLB Tr., Respondent's Appendix, pp. A12-A14).

The only live testimony offered by Petitioner at the second P.L. Board hearing was his own. The Petitioner gave his own version of the events of April 26, 1971, leading up to and resulting in the fight with Flatt (PLB Tr., Respondent's Appendix, pp. A15-A29).

Having come to the second Board hearing without all of the evidence he wanted to offer, Petitioner then requested the Board to reconvene the hearing at another date and to require the production of investigative notes of a railroad policeman and the attendance of two railroad employees, Engineer Laidler and Assistant Trainmaster Cunningham. Both Laidler and Cunningham had testified in person at the trainmaster's hearing. At the request of the Board, Petitioner's attorney made offers of proof as to what he believed this additional evidence might show. The offers of proof were summarized by the Board as follows:

> Mr. Reosti has outlined the three offers of proof that is on the record, namely Mr. Laidler, the engineer Mr. Cunningham, the assistant yardmaster and trainmaster; and the investigative notes of the company police for the purposes of showing the demeanor of the parties, Mr. LaFontaine, and the location of the automobile, Mr. Flatt's automobile, and the location of the lantern, where the lantern was found. Am I correct?
>
> MR. REOSTI: Yes.

(PLB Tr., Respondent's Appendix, pp. A30-A31).

The Board responded to Petitioner's request as follows:

> MR. SEMPLINER: Let the record show that the Board has met in executive session and that we have considered the various matters brought up, including the offers of proof by Mr. Reosti; that if engineer Laidler were present that he could testify as to the demeanor of

the parties in showing that it was cordial. He could testify as to the location of the auto, showing that there was a variation between that presented to the Board at the hearing and presently; that Mr. Cunningham might be able to testify as to where the lantern was eventually found after the altercation in the parking lot. The Board is unsure if the transcript shows this or not; that if they had the investigative notes of the carrier's officers or the Dearborn Police Department, they might also show as to where the lantern was found.

The Board is of the opinion that these offers of proof are not greatly material to the decision to be rendered in this case and that therefore they will deny that these additional witnesses be heard before the Board.

(PLB Tr., Respondent's Appendix, p. A31) (emphasis added).

On April 23, 1982, the Board issued its decision denying Petitioner's claim. The Board rejected the argument that the dual union representation of Petitioner and Flatt at the trainmaster's hearing had denied Petitioner a fair hearing, stating:

A review of the transcript indicates that claimant was represented by representatives of his choice, participated in the investigation to an unusual extent, and appears to have been, in terms of jailhouse legalese, perhaps the most knowledgeable person present.

(PLB Award 120A, Petitioner's Appendix, pp. A23-A24).

The Board found Petitioner's testimony simply lacked credibility. Concluding that Petitioner had initiated the confrontation with Flatt, the Board stated:

Claimant LaFontaine was examined by his counsel, Ronald Reosti. A review of the transcript and the testimony of claimant LaFontaine would indicate claimant's testimony was less than reliable. It was further indicated that claimant thought he could direct his work and run the railroad better than his superiors who were charged

> with this responsibility. Claimant was argumentative, and in going to his car purposely went out of his way to go near Flatt's car and a fight ensued.
>
> (PLB Award 120A, Petitioner's Appendix, pp. A24-A25).

After the second Board hearing, Petitioner instituted this his second lawsuit in the United States District Court for the Eastern District of Michigan. Petitioner alleged, *inter alia*, that (1) the second Board hearing denied him substantive and procedural "due process"; (2) his discharge was a violation of the Collective Bargaining Agreement between the Railroad and his Union; and (3) he did not receive a full and fair hearing in violation of 45 U.S.C. §153.

Thereafter, Respondent filed a Motion for Summary Judgment. Petitioner responded with his own Motion for Summary Judgment. On November 8, 1982, the District Court granted the Respondent's Motion for Summary Judgment, dismissing Petitioner's action. The District Court set forth the reasons for its decision in part as follows:

> It is unnecessary for this Court to become involved in the legal thicket of whether a want of due process is an appealable issue. In this case there was no want of process that was due. The plaintiff had a fair hearing, and the issue was lost.
>
> This Court does not have jurisdiction to consider the merits of the plaintiff's case *de novo*.
>
> (District Court Opinion, Petitioner's Appendix, p. A7).

Petitioner appealed the District Court decision to the Sixth Circuit Court of Appeals. He claimed, *inter alia*, that (1) the second P.L. Board hearing denied him due process because the Board considered the trainmaster's hearing transcript and denied his request to require the production of additional evidence and (2) the hearing failed to comply with unspecified procedural requirements of the RLA for such hearings.

The Court of Appeals affirmed in an unpublished per curiam opinion. The Court held that a P.L. Board decision is

conclusive on the parties except in the three situations enumerated in 45 U.S.C. §153 First(q), "(1) when the Board fails to comply with the requirements of the Railway Labor Act; (2) when the Board exceeds its jurisdiction; and (3) when the Board's decision is tainted by the fraud or corruption of a member of the Board" (Circuit Court Order, Petitioner's Appendix, p. A2). Petitioner's "due process" claim was not cognizable because it did not involve the three statutory grounds for judicial review.

The Court also rejected Petitioner's second argument. Describing this issue as "essentially an evidentiary question," the Court of Appeals held that the RLA did not require the Board to call witnesses merely when requested to do so by a party.

Petitioner then filed his Petition of a Writ of Certiorari. Respondent concedes that the Petition was timely.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THIS COURT HAS RECENTLY HELD IN *UNION PACIFIC R. CO. v. SHEEHAN*, THAT BOARD DECISIONS RENDERED PURSUANT TO THE RAILWAY LABOR ACT, 45 §153 FIRST(q), ARE NOT SUBJECT TO JUDICIAL REVIEW FOR ALLEGED NON-STATUTORY DUE PROCESS VIOLATIONS

By virtue of 45 U.S.C. §153 First(q), the findings and award of a Public Law Board are conclusive on the parties. The narrow scope of permissible judicial review of Board decisions is set forth in that statute as follows:

> The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. *On such review, the findings and order of the division shall be conclusive on the parties*, except that the order of the division may be set aside, in whole or in part, or remanded to the division, [1] *for failure of the division to comply with the requirements of this chapter*, [2] *for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or* [3] *for fraud or corruption by a member of the division making the order.*

(emphasis and numbering added).

This Court in *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89 (1978) (per curiam), *reh'g denied*, 439 U.S. 1135 (1979), foreclosed all judicial review of Board decisions for any reason other than the three statutory grounds set forth in 45 U.S.C. §153 First(q).[3] In affirming the continued validity of its earlier decisions, in *Sheehan* this Court squarely rejected

[3]Although the appeal in *Sheehan* was taken from an NRAB decision, there is no claim that the scope of judicial review is different for decisions of Public Law Boards. See *e.g., Cole v. Erie Lackawanna Ry. Co.*, 541 F.2d 528 (6th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977).

an attempt to attack a Board decision on due process grounds *not* contained within the RLA. After paraphrasing the statutory language, the Court stated:

> Only upon one or more of these bases may a court set aside an order of the Adjustment Board.
>
> * * *
>
> *The dispositive question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act.* Section 153 First(q) unequivocally states that the "findings and order of the [Adjustment Board] shall be conclusive on the parties" and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language *means just what it says.*
>
> * * *
>
> A contrary conclusion would ignore the terms, purposes and legislative history of the Railway Labor Act. In enacting this legislation, Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements.

439 U.S. at 93-94 (emphasis added).

Sheehan, a discharged railroad employee, claimed that he was denied due process by a NRAB decision barring his claim for his failure to file it within the required period of time. Despite this alleged denial of due process, the Supreme Court concluded that the congressionally-mandated finality of Board decisions precluded judicial review when none of the statutory grounds for review were implicated in the due process claim:

> Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board

> and out of the courts. [citation omitted] The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations. Normally finality will work to the benefit of the worker: He will receive a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear then the railroad. [citation omitted] Here, the principle of finality happens to cut the other way. But even-handed application of this principle is surely what the Act requires.
>
> 439 U.S. at 94.

Thus, *Sheehan* is an unmistakable rejection of the prior attempt of several lower courts to carve a non-statutory "due process" exception to the finality of Public Law Board decisions. Moreover, the decision in *Sheehan* is consistent with prior Supreme Court decisions on this issue. In at least two earlier cases, this Court concluded that judicial review of Board decisions was not available on any grounds other than the three set forth in 45 U.S.C. §153 First(q). For example, in *Brotherhood of Locomotive Engineers v. Louisville & N. R. Co.*, 373 U.S. 33 (1963), the court stated:

> The several decisions of this Court interpreting §3 First have made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes. The right of one party to place the disputed issue before the Adjustment Board, with or without the consent of the other, has been firmly established.
>
> * * *
>
> A corollary of this view has been the principle that the process of decision through the Adjustment Board *cannot be challenged collaterally by methods of review not provided for in the statute.*
>
> 373 U.S. at 38 (emphasis added).

This principle was reiterated in *Andrews v. Louisville & N. R. Co.*, 406 U.S. 320 (1972):

> A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. [citation omitted] *He is limited to the judicial review of the Board's proceedings that the Act itself provides.*
>
> 406 U.S. at 325 (emphasis added).

In the case at bar, Petitioner has failed to demonstrate any compelling reason why this Court should depart from this well-reasoned line of authority. The RLA has not been amended since *Sheehan* was decided, nor has this Court rendered any decisions that would merit a reconsideration of *Sheehan*. This Court's holding in *Sheehan* that any "due process" review of Public Law Board decisions is restricted to the three limited categories of review provided for in the RLA is still good law. Petitioner's request for a Writ of Certiorari should be denied.

II. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY INTERPRETED AND APPLIED *SHEEHAN* AND 45 U.S.C. §153 FIRST(q) TO THE FACTS IN THE PRESENT CASE

Petitioner argues that the Sixth Circuit's interpretation of *Sheehan* in this case, if permitted to stand, "would grant Congress the right to take property without due process of law" (Petition for Writ of Certiorari, p. 19). He would have this Court believe the Sixth Circuit interpreted *Sheehan* to preclude judicial review of Board decisions on *all* "due process" grounds. Such is not the case.

Respondent submits the Sixth Circuit decided that an alleged denial of "due process" in Board proceedings will be subject to judicial review only when the denial involves one of the three statutory grounds of 45 U.S.C. §153 First(q). "[A] court may not review . . . [a Public Law Board] decision unless one of the three circumstances identified in §153(q) is present *in the decision rejecting the due process claim*" (Circuit Court Opinion, Petitioner's Appendix, p. A3) (emphasis existing in original).

Thus, rather than deciding that *no* due process rights of any kind attach to Board proceedings, the Sixth Circuit, correctly applying *Sheehan*, held that only those rights which are expressly provided in 45 U.S.C. §153 are guaranteed. These include, *inter alia:* (1) a hearing which complies with the express requirements of the RLA, (*e.g.*, advance notice; right to representation, etc.); (2) a decision which is based only on matters within the Board's jurisdiction; and (3) a decision which is not improperly influenced by fraud or corruption of a Board member.

Stated another way, the measure of the "process" to which the parties at Board proceedings are "due" is exactly that set forth in the RLA, nothing more. The Supreme Court in *Sheehan* held only that a due process attack cannot be mounted against alleged irregularities of Board proceedings on any non-statutory grounds. Petitioner's claim that the Sixth Circuit's decision is inconsistent with *Sheehan* and other applicable decisions of this Court is without foundation. Thus, Petitioner's request for a Writ of Certiorari should be denied.

III. THE CIRCUIT COURTS OF APPEALS HAVE UNIFORMLY INTERPRETED *UNION PACIFIC R. CO. v. SHEEHAN* TO PRECLUDE JUDICIAL REVIEW OF BOARD DECISIONS ON GROUNDS OTHER THAN THOSE SET FORTH IN 45 U.S.C. §153 FIRST(q)

Since *Sheehan* was decided by this Court, the Court of Appeals in two circuits have addressed the question of whether Public Law Board decisions are subject to judicial review on non-statutory "due process" grounds. In each instance, including the present case, the appellate court has held that an employee's "due process" arguments challenging the decision of the Board, which do not implicate any of the three statutory grounds of judicial review in 45 U.S.C. §153 First(q), will not be considered. *United Steelworkers of America v. Union R. Co.*, 648 F.2d 905 (3rd Cir. 1981); *Jones v. St. Louis-S. F. Ry.*, __F.2d __, 100 Lab. Cas. (CCH) ¶10,806 (6th Cir. February 14, 1984).

In *United Steelworkers of America, supra,* plaintiff, a discharged employee, claimed that he had been denied due process by the alleged lack of counsel at an investigative hearing and by the dual role of a union representative at the Public Law Board hearings. The District Court agreed, ordering that a new Public Law Board be reconstituted with a different union member, and that this Board remand the case to the railroad for a *de novo* investigative hearing.

The Court of Appeals for the Third Circuit reversed this ruling, and reinstated the third Public Law Board decision upholding the discharge. The Court was not persuaded by the plaintiff's attempts to distinguish and limit the Supreme Court's holding in *Sheehan,* stating:

> Godich suggests that *Sheehan* applies only to denials of procedural due process. He characterizes his contention that he was denied the right to counsel as an allegation that he was deprived of substantive due process. Therefore, according to Godich, judicial review of his claim is not limited by the narrow standards of the statute. However, even if Godich's characterization of his claim is correct, we note that there is no language in *Sheehan* to justify such a procedural/substantive distinction.
>
> *To the contrary, the Court in Sheehan was quite specific in rejecting nonstatutory grounds for review.*
>
> Thus, the district court was bound by the Board's findings that Godich was not denied the right to separate representation at the investigative hearing unless (1) the Board failed to act in compliance with the Railway Labor Act, (2) the order of the Board was outside the scope of its jurisdiction, or (3) one of the Board's members acted fraudulently or corruptly.
>
> 648 F.2d at 911-12 (emphasis added).

The Court in *Steelworkers* concluded that none of the "due process" grounds for reversal of the Public Law Board's deci-

sion fell within any of the three statutory categories for judicial review of 45 U.S.C. §153 First(q).

In *Jones v. St. Louis-S. F. Ry., supra,* a different panel of the Sixth Circuit Court of Appeals also interpreted *Sheehan* to preclude a "due process" review of Public Law Board decisions on non-statutory grounds. Following an investigatory hearing, the plaintiff in *Jones* was discharged for his responsibility in connection with a train derailment. His discharge was upheld by a Public Law Board established by an agreement between the defendant and the Brotherhood of Locomotive Engineers.

The plaintiff then filed a civil suit, claiming, *inter alia,* that he had been denied due process and equal protection because only one of three Board members who decided the case either was present at the Board hearing or had reviewed the hearing transcript. Although the Board's decision was reversed for a failure to comply with the requirements of 45 U.S.C. §153 First(j) and (n), the Court concluded that the decision was not subject to a general non-statutory "due process" review, stating "While the appellant characterizes this error as constituting a due process violation, we recognize that such a claim cannot serve as a basis for judicial review in this context (citations omitted)."

The only authority cited by Petitioner in support of his claim of entitlement to a non-statutory "due process" review of the Board's decision is the District Court opinion in *Broth. of Maintenance of Way Employees v. St. Johnsbury & L. C. R.R.,* 512 F. Supp. 1079 (D. Vt. 1981). There the plaintiff union sought to enforce two NRAB awards for vacation pay. Several defendants and third-party defendants moved to dismiss the action on the ground identical to that raised by Petitioner here in his first lawsuit: they did not receive proper advance notice of the Board hearing. The court agreed that the notice required by 45 U.S.C. §153 First(j) was not received, and remanded the case of the Board to hold a hearing after the issuance of proper notice.

The court then engaged in the discussion of *Sheehan* quoted by Petitioner, which was totally unnecessary to the resolution of the case. Effectively admitting that its discussion of *Sheehan* was *obiter dicta*, the court in *St. Johnsbury, supra*, stated:

> In light of our disposition of this case, we need only rely on our power to review for compliance with the terms of the Railway Labor Act.
>
> * * *
>
> Accordingly, we decline to enforce the award "for failure of the division [of the NRAB] to comply with the requirements of [the Railway Labor Act]." 45 U.S.C. §153 First(p.) [sic] . . .
>
> Because the Railway Labor Act itself, properly applied, provides adequate procedural protection for all parties involved in the dispute, *we need not reach the question of due process today*.

512 F. Supp. at 1084, 1087 (emphasis added).

Respondent submits that the decision in *St. Johnsbury, supra*, is merely an abberation from an otherwise unbroken line of cases interpreting *Sheehan* to preclude judicial review on all non-statutory grounds. In addition to its departure from the appellate court decisions previously discussed, *St. Johnsbury* is contrary to decisions of other district courts. *See Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169 (M.D. Ala. 1982); *Adamczewski v. Northwest Airlines, Inc.*, 530 F. Supp. 100 (N.D. Ill. 1981). Absent any conflict among the circuit courts of appeals as to whether non-statutory "due process" review of Public Law board decisions is available, Petitioner's request for a Writ of Certiorari should be denied.

IV. A WRIT OF CERTIORARI IS UNNECESSARY BECAUSE PETITIONER HAS ALREADY RECEIVED A NON-STATUTORY DUE PROCESS REVIEW OF THE P.L. BOARD PROCEEDINGS AND DECISION FROM THE DISTRICT COURT

Petitioner has received all the consideration to which he is entitled by the RLA, 45 U.S.C. §153 First and Second and more. He has had not one but two hearings before the P.L. Board, the second of which he was ably represented by counsel of his choice. Altogether, he and his representatives have had no less than four opportunities (one trainmaster's hearing, two P.L. Boards and one District Court hearing) to persuade those considering his case that they should accept his version of the events of April 26, 1971.

At the second P.L. Board hearing, Petitioner testified in person, introduced seven new exhibits and made an offer of proof as to what several additional witnesses would say if they were called to testify. After considering the trainmaster's transcript and Petitioner's live testimony and offers of proof, the Board denied his claim and upheld his discharge. The Board expressly rejected Petitioner's claim that the trainmaster's transcript was tainted by dual union representation (PLB Order 120A, Petitioner's Appendix, pp. A23-A24).

Moreover, the Petitioner received from the District Court the "due process" review that he so fervently desired. The District Court assumed, without deciding, that it was authorized to conduct a general "due process" review of the Public Law Board's proceedings and decision. Concluding that Petitioner had received a fair and full hearing, the Court stated:

> There was nothing unfair in considering the trainmaster's transcript of the original proceedings . . . Under the applicable statute in law, [Petitioner] did have the opportunity to submit additional written material and was given the opportunity to, and did, testify. Furthermore, he was given the opportunity to, and did, make an offer of proof on what the witnesses would, in his opinion, testify . . . In this case there was no want of process that was due. The plaintiff had a fair hearing and the issue was lost.
>
> (District Court Opinion, Petitioner's Appendix, pp. A6-A7).

Thus, there is no need for the Supreme Court to issue a Writ of Certiorari in this case to decide whether Petitioner should be entitled to a kind of judicial review he has already received. Regardless of whether a Board decision is subject to non-statutory due process review by a federal court, a Writ of Certiorari should not be granted in the instant case because Petitioner has had a fair hearing.

V. THE SECOND QUESTION PRESENTED BY PETITIONER HAS LITTLE SIGNIFICANCE BEYOND THE PRESENT CASE

Petitioner formulates the second question presented by his Petition for a Writ of Certiorari as follows:

> Does the language of 45 USC §153(q) [sic] and of the agreement between the United Transportation Workers Union (UTU) and the Chesapeake and Ohio Railway Company (C&O) mandate the production of necessary witnesses and evidence before Public Law Boards and provide the subpoena for their production?

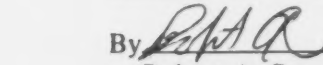
He raises this question in his Petition for Writ of Certiorari, but fails to specifically address this issue in his Argument. Nowhere does Petitioner identify any particular portion of 45 U.S.C. §153 First(q) which purports to empower the Board to compel the production of witnesses or evidence at the request of a party.

When making this same argument to the Court of Appeals, Petitioner relied solely on the provisions of the Agreement between Respondent and the UTU, creating the P.L. Board which are quoted at pp. 4 and 5 of his Petition for Writ of Certiorari. The interpretation of this contract language has significance, if any, only to the Petitioner, Respondent, and those few of Respondent's employees whose claims may be submitted to this P.L. Board for resolution. While Respondent submits the Court of Appeals correctly decided this issue, an unpublished decision on the interpretation of a private contract, even if erroneous, does not present a matter worthy of Supreme Court review.

CONCLUSION

Respondent respectfully submits that Petitioner has wholly failed to sustain his burden of establishing under Sup. Ct. R. 17 that there are special, important reasons why a Writ of Certiorari should be granted in this case. The Court of Appeals correctly held that a federal court may not review a Public Law Board decision on "due process" grounds, unless one of the three statutory grounds enumerated in 45 U.S.C. §153 First(q) is present in the Board's decision rejecting the due process claim. The decision below does not involve an important question of federal law which has not been, but should be, settled by this Court. This major issue raised by Petitioner was decided only five years ago in *Sheehan*. There have been no legal or social developments in the short period since the *Sheehan* decision which warrant this Court's reconsideration of the scope of judicial review available under 45 U.S.C. §153 First(q). Consequently, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
CROSS, WROCK, MILLER & VIESON

By 

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Dated: April 12, 1984

PUBLIC LAW BOARD HEARING

In The Matter Of:
ROBERT LaFONTAINE
Plaintiff,

—vs—

CHESAPEAKE & OHIO RAILROAD,
Defendant.

PUBLIC LAW BOARD HEARING, taken before me, Donald R. Henry, R-2098, Notary Public within and for the County of Wayne, State of Michigan, at One Northland Plaza, Suite 307, Southfield, Michigan, on Thursday, September 20, 1979, commencing at 10:00 o'clock in the forenoon.

Panel Members:

MR. ARTHUR SEMPLINER, Chairman
MR. C. J. SCHULER, Member
MR. L. J. WOTASZAK, Member

Appearances:

REOSTI & PAPAKHIAN
925 Ford Building
Detroit, Michigan 48226
By: MR. RONALD REOSTI
Appearing on behalf of the Plaintiff.

MR. DONALD T. KELLY
One Northland Plaza, Suite 407
Southfield, Michigan 48075
Appearing on behalf of the Defendant.

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Southfield, Michigan
Thursday, September 20, 1979
10:00 A.M.

MR. SEMPLINER: Call the board to order. Let the record show that Mr. LaFontaine is present, represented by Mr. Reosti.

I have correspondence in my possession indicating that Mr. Reosti would represent Mr. LaFontaine and that Mr. Allen, or the general chairman of the committee, would be relieved of responsibility in that matter.

Is that correct, Mr. Reosti?

MR. REOSTI: That is my understanding.

MR. SEMPLINER: Mr. LaFontaine, is that your desire then?

MR. LaFONTAINE: Yes, sir.

MR. SEMPLINER: Mr. Allen, you are here as an observer?

MR. ALLEN: I am here to interpret the agreement.

MR. SEMPLINER: We have had an executive session, in which several matters were brought up before the Board. One of them was the question of a court reporter, which Mr. Reosti brought with him, to record this hearing. It was the decision of the Board that this court reporter would be allowed to record the hearing on two conditions; one is that the parties who brought the court reporter be responsible for paying the court reporter and not the Board, and two is that the Board be furnished a copy of the transcript as soon as it is ready.

Is that agreeable to you, Mr. Reosti?

MR. REOSTI: Yes.

MR. SCHULER: I interpret the Board to mean that each member of the Board be furnished a copy.

MR. SEMPLINER: If it is furnished to me, I will—I will

leave that up to Mr. Reosti, but each member of the Board will get a copy.

The Board is meeting pursuant to an order of the United States Court of Appeals of the Sixth Circuit and the order of Judge Churchill, as issued by Judge Kaess, dated April 30th, 1976. I would like to read those orders into the record.

Since we are all familiar with them, Mr. Reporter, do you want to just copy them in?

Whereupon the court orders were copied into the record as follows:

ORDER

(United States Court of Appeals For the Sixth Circuit)

(Filed April 18, 1978)

(Robert LaFontaine, Plaintiff-Appellee, v Chesapeake and Ohio Railroad Company, Defendant-Appellant. No. 76-2491)

BEFORE: LIVELY and MERRITT, Circuit Judges; and RUBIN, District Judge.*

The sole issue in this case is whether an employee on whose behalf a union had submitted a claim of wrongful discharge to a Public Law Board created pursuant to the Railway Labor Act was entitled to actual notice of the hearing before the Public Law Board. In *Cole v. Erie Lackawanna Railway Co.*, 541 F.2d 528 (1976), *cert. denied*, 433 U.S. 914 (1977), this court held that actual notice of a hearing is required "for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." We conclude that the quoted language is dispositive of this appeal.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk

*The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

ORDER REMANDING CASE TO
PUBLIC LAW BOARD
(United States District Court
Eastern District of Michigan
Southern Division)
(Filed April 30, 1976)

(Robert LaFontaine, Plaintiff, v The Chesapeake and Ohio Railway Company, Defendant. No. 74-71397)

At a session of said Court held in the U.S. District Court, Detroit, Michigan on April 19, 1976.

PRESENT: HONORABLE James P. Churchill
U.S. District Judge

This matter having come on to be heard upon motion of the Plaintiff and the Court being fully informed in the premises;

IT IS HEREBY ORDERED that the decision of the Public Law Board 347 upholding Plaintiff's discharge be set aside and that this matter be remanded to said Public Law Board for rehearing on the merits.

Honorable /s/ Fred W. Kaess
U.S. District Judge
For Judge James P. Churchill

MR. SEMPLINER: Mr. Reosti, you have furnished the Board a brief to exclude from evidence the transcript of the Trainmaster's Hearing?

MR. REOSTI: That is correct.

MR. SEMPLINER: The Board has considered this brief. Incidentally, you gave me the originals and I will return them to you. We have Xeroxes.

It is the position of the Board that this transcript has already been admitted to the Public Law Board. It is in the record, together with the briefs as submitted by the Carrier and the organization and that this is a part of the evidence before the Board and, while the issues may be argued, we cannot exclude what we already have.

Mr. LaFontaine, you are here present. Is there any issue, relative to the notice which you have had to be here before this Board?

Mr. Reosti, I will allow you to answer.

MR. REOSTI: No.

MR. SEMPLINER: Mr. Reosti, you have produced Mr. LaFontaine and I assume he is here pursuant to this notice?

MR. REOSTI: Right.

MR. SEMPLINER: Now we are ready to proceed, gentlemen?

An issue of law, which has been raised and which we discussed in executive session, is that the carrier takes the position that this hearing is moot because the parties are not solely the parties of the organization and the carrier, but now they have an individual. Mr. LaFontaine is represented by Mr. Reosti. The Board has ruled against this position, but the carrier wants to preserve it for any future use.

Do you wish to respond to that?

MR. SCHULER: I think this would be an adequate time, appropriate time rather.

MR. KELLY: The carrier's position is that since, under the statute, the only parties to a dispute before a Public Law Board is the carrier and the union, and as Mr. LaFontaine has discharged the union as his representative, there is no longer any dispute between the parties and the case is moot. Accordingly, the carrier has asked the Board to dismiss this case.

MR. SEMPLINER: Do you want to answer that?

MR. REOSTI: I would like to clarify something. It is my understanding that the union was relieved of the responsibility of representing Mr. LaFontaine as his personal representative and that I have, in fact, been substituted as the representative for Mr. LaFontaine. It is not my understanding that the union therefore becomes a non-party. It is my understanding that

the union is still a party to this hearing in the sense that they have, in accordance with the direction of the United States Federal District Court, reconvened this Board pursuant to the agreement which established the Board for the purposes of hearing this case and if the union takes a different position in this matter than what I have just indicated or either they object to and are disobeying the order of the United States District Court in reconvening this Board, then I would like to get a hearing on that or a statement of that, but I don't think the fact that I am here representing Mr. LaFontaine means that the union has become a non-party to this case. I don't think that is the alternative to the fact that an employee has his own private representative.

MR. SCHULER: Mr. Reosti, are you in any manner representing the union in this case?

MR. REOSTI: No, I am representing the employee.

MR. WOTASZAK: I would have to state the union's position is that the U.T.U. is still a party to the Board and it was set up under the Public Law Board amendment to the Railway Labor Act. However, in this particular case representing Mr. LaFontaine, at his request, the union was released of representing him further before this Board and the representation was turned over to Mr. Reosti. It is the organization's position that the Board was established prior to and still exists. However, the union has no responsibility for further representation in this particular case.

MR. REOSTI: Representation of Mr. LaFontaine.

MR. WOTASZAK: Right.

MR. KELLY: Mr. Allen, may I ask you whether or not there is not a dispute existing? Are you progressing the case, is the U.T.U. progressing the case before this Board for Mr. LaFontaine's reinstatement?

MR. ALLEN: The U.T.U. is not progressing the case before this Board except as an interested party in interpreting the agreement under the discipline rules. The organization has

been relieved, by formal notification over Mr. LaFontaine's signature, and it has relinquished that representation to Mr. Reosti.

MR. KELLY: May I at this point read the portion of the Public Law Board Agreement, under which this Board was created? Section 8 says: "At such hearing a party may be heard in person, by counsel or by all other representatives as they may select."

The parties to this agreement are the Chesapeake and Ohio and the United Transportation Union. The only way that Mr. Reosti could have a standing here, as we see it, is if he is retained by the union as counsel for the union to progress this claim.

MR. REOSTI: Let me just—

MR. SEMPLINER: I will give you an opportunity in a minute, if you still want one, Mr. Reosti. But as stated before we started discussing this matter, the Board has considered this and it's the opinion of the majority of the Board that this matter is still properly before the Board and that the purpose of bringing it up at this time is purely to preserve the carrier's position if they want to use it at a later time and in another place.

Now, you may go on.

MR. REOSTI: I understand that. I don't want to belabor this. I want to make one statement for the record and that is that the two documents that have been referred to, my appearance as counsel for Mr. LaFontaine and the statement relinquishing responsibility or authority to represent Mr. LaFontaine, were executed at the direction and request of the union and I have no problem with either of those documents. I think they are correct and I think that is the way to proceed, but it was never our interpretation that by so doing, that we would, in anyway whatsoever, jeopardize the jurisdiction or the integrity of this Board.

MR. KELLY: For the record, the carrier is not in agree-

ment at this point.

MR. SEMPLINER: The carrier is not in agreement. The Board rules against the carrier and holds that this is properly before the Board except to preserve the carrier's position if it wants to argue it at a later time. That is the only reason I brought it up at this point.

There is considerable research and law on the subject. We all know that an individual cannot bring a case for a Public Law Board. It has to be brought by the union, but we are past that point here. We have two court orders on it.

Proceed, Mr. Reosti. I think we should hear from Mr. LaFontaine.

MR. REOSTI: The first matter that I would like to raise is the question of my request to the Board to have Mr. Cunningham present. I have tried to speak to the attorney for the carrier on that subject, but have not been able to get an acknowledgement that he received a copy of my September 12th letter to Judge Sempliner and in fact he indicates that the letter, the carbon copy, did go to Mr. Schuler. I made a request for two items, basically, of evidence. One is the presence of Mr. Cunningham and the other is the production of the investigative notes made by the railroad's investigators, in particular the officers who interviewed Mr. Flatt and the officials who were in charge on the property on the night in question, who also investigated the incident. So, I would like to get a response to those two requests.

MR. SCHULER: I will speak on behalf of the carrier, if I may.

The carrier objects to the request that Mr. Reosti has made and we base that on the decision of the first divisional Railroad Adjustment Board. Following any Public Law Board decision in discipline cases, the Board is functioning and the Railway Labor Act are precluded from hearing new evidence, hearing new witnesses. They are bound to make their decision based wholly upon the original transcript of the matter under investigation.

If you are interested, we can introduce a few awards so stating. There are many of them. I don't know whether the judge is familiar with them. Dackrins well established that in discipline cases, the Board is limited in their consideration to the original transcript. So, for the carrier, we feel that we are restricted to the transcript that was introduced before this Board in the previous hearing and it is out of order to request any other witnesses.

MR. SEMPLINER: I feel until we have heard from Mr. LaFontaine and a need is shown, that we cannot consider any additional witnesses.

MR. REOSTI: Well, it's my feeling that without additional witnesses we won't be able to show the need. I am willing to go through the matter with Mr. LaFontaine and to introduce some exhibits that we have prepared, showing the parking lot and the various aspects of the parking lot, but the fact of the matter is that unless we are able to introduce the testimony of Mr. Laidler or Mr. Cunningham, and/or Mr. Cunningham, and to reexamine the investigative notes of the officers in question, I don't think that we would be in a position to adequately present our case on behalf of Mr. LaFontaine.

Much of the problem, it seems to me, is the fact that the original transcript was a transcript of a hearing which was conducted under unusual circumstances. At least I hope unusual circumstances, where Mr. LaFontaine was represented by an official of the union who was, I have no doubt, trying to do a good job but however an impossible task of representing Mr. LaFontaine and Mr. Flatt simultaneously. Given that that's the transcript that we are relying on for Mr. LaFontaine to be able to adequately present his case, he needs the additional evidence that we are requesting at this point.

MR. SEMPLINER: This may develop from Mr. LaFontaine's testimony, but at present it's simply argument on your part.

MR. SCHULER: That point was thoroughly argued before

the District Court and your position was not upheld.

MR. REOSTI: I don't think that's true. For the record, I want to make it very clear that the District Court stated, in his opinion, Judge Churchill's opinion of February 13th, 1975, that: "Upon remand, the issue of fairness of representation in the use of the Trainmaster's hearing transcript can be raised at such a hearing." That's what I am doing right here.

MR. SCHULER: I'm speaking of the question of the local chairman or the union representative representing both individuals at the original hearing. It was touched upon in your pleading.

MR. REOSTI: And the judge's opinion will speak for itself and I think what I have quoted from the judge's opinion, which is in response to the argument that I made regarding the reliance of the Board on that transcript, I think that what Judge Churchill stated was that upon remand—to reiterate that quote: "The issue of fairness of representation and the use of the Trainmaster's hearing transcript can be raised at such a hearing."

So Judge Churchill certainly didn't rule one way or the other as to whether or not the Board should rely upon the transcript or whether or not the hearing was fair. It simply stated that upon remand those were issues to be determined de novo or by the Board.

MR. SEMPLINER: Was that not limited somewhat by the Sixth Circuit Order which said the sole issue in this case was whether the employee on whose behalf a union has submitted a claim of—

MR. REOSTI: That was the sole issue on appeal because we won below and it was the railroad who was appealing and that was the only thing that the railroad could appeal was a decision which was adverse to itself, which was that the case being remanded for the lack of notice. So, the Sixth Circuit never reached the issue of fairness of the Trainmaster's Hearing. It just simply wasn't before it. In fact, the only decision

by any court on that issue is that the issue of fairness of representation and use of the Trainmaster's Hearing transcript can be raised at such a hearing, meaning this kind of a hearing. That is what we have done with my motion and I believe, in support of that motion, arguing that the transcript be excluded as evidence in this hearing and the court, this Board rather, has made its decision as to that issue.

I think we are getting somewhat afield from what was being discussed and that is whether or not we should proceed without the witnesses that I requested and I think I understand Judge Sempliner's request. I think that somewhat differs as to whether or not we are going to relitigate my motion. I think you have already decided against that motion. I think there isn't any sense in relitigating that. What I was going to suggest is that I have prepared a submission which I think does make reference to the kinds of testimony that we would expect to elicit from Mr. Laidler and Mr. Cunningham, and Mr. Laidler in particular, and I have some documents which Mr. Laidler would be an important witness to. My suggestion is a procedural matter. What I am suggesting to do is that I submit this to the Board, along with the proposed exhibits and have the Board review this information and make a decision as to whether or not we can have that testimony that I have requested, of Mr. Laidler and Mr. Cunningham, and the investigative notes and if the Board so decides, then we can reconvene at another date for the submission of that testimony or that evidence.

MR. SEMPLINER: We will receive anything that you wish to submit. We would still like to hear from Mr. LaFontaine.

MR. REOSTI: That is fine. Let me make the offer of proof anyway, in essence. Again, there are three copies of the submission and three copies of an affidavit, which it should be a part of that, which goes to just one point.

Here is three copies of Plaintiff's Proposed Exhibit 1, which would be a counter to the carrier's original Exhibit 4, I think it was, a diagram of the parking lot.

These are exhibits 2 to 7, which are photographs of the parking lot. My offer of proof is that Mr. Laidler would testify that in those photographs his automobile, which on Plaintiff's Exhibit Number 1 is labeled "B", is the Ford Pinto wagon which is parked on the far south side of the parking lot. I think the rest of the photographs are self-explanatory.

MR. SCHULER: Are the photographs dated as to when they were taken?

MR. REOSTI: No, but I would represent that they were taken last week.

Just for the record, Exhibit Number 2 is a picture of the parking lot from Ferney, showing where Mr. LaFontaine's car would have been if it had been parked seven cars from Ferney, which was the testimony in the transcript, and also shows Mr. Laidler's car, the Ford Pinto.

Exhibit Number 3 is a photograph of the same parking lot from the middle aisle, where supposedly Mr. Roberts was parked, which also shows Mr. Laidler's car which was parked approximately where he would testify that Mr. Flatt's was parked on that evening, which shows the distance between Mr. Flatt's car and the Rougemere Office.

Exhibit Number 4 is another picture of the parking lot from Ferney, which shows again, in a little different angle, what the angle would have been had Mr. LaFontaine left the Rougemere Office and walked to his car, which had been parked seven spaces from Industrial on Ferney as the testimony indicated.

Exhibit Number 5 is a photograph showing Mr. Laidler's car and the space next to it, which would have been the furthest that anyone, who saw Mr. Laidler, testified as to the location of Mr. Flatt's car on the night in question and shows this in relationship to the Fruit Growers Express and the basement stairs at the Rougemere Office.

Photograph 6 is a photograph showing a woman by the name of Shirley Newman, who is my investigator, standing

120 feet west of the Rougemere Office and in a direct straight line, which would have been the point represented in the carrier's Exhibit Number 4 as the point where Mr. Flatt's car was located. It shows that point in relationship to Mr. Laidler's car in the area in which he would testify that Mr. Flatt's car was in fact located.

And Exhibit Number 7 is another photograph showing Mr. Laidler's car again parked approximately where he thinks Mr. Flatt's car was parked on that evening and its relationship to the office and the stairway and the area in which persons existing [sic] from the basement of the Rougemere Office would have walked as they entered into the parking lot.

So those are the submissions that we would make and the offer of proof, and it's our contention that if we were allowed to introduce testimony at this hearing, which is on remand, that we would introduce testimony to support these exhibits.

MR. KELLY: In view of what was submitted by counsellor for Mr. LaFontaine, the carrier would like an opportunity to file a response thereto after we have had an opportunity to review it.

MR. SEMPLINER: You will have an opportunity to put in any responses that you want. The position of the Board is not to prohibit you from introducing testimony that could have been produced at the time of the original hearing. The position of the Board is that the testimony at the time of the original hearing of the Board was limited to the transcript and such testimony as was shown to be necessary to show that the transcript was incorrect. At this point, we haven't had such testimony or any testimony that can do that and that is where we stand at the present time.

The carrier will have an opportunity to put in answers and argument.

MR. SCHULER: I think that we should proceed with your questioning or allowing Mr. LaFontaine to make a statement.

MR. REOSTI: I take it the Board will allow me to directly examine Mr. LaFontaine?

MR. SEMPLINER: Yes.

ROBERT LAFONTAINE, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. REOSTI:

Q. Mr. LaFontaine, I am going to ask you some questions and I want you to, of course, give your answers to the Board.

Do you recall the date in question, April 26th, 1971?

A. Yes.

Q. On the date in question at approximately five o'clock at the location, which has been referred to as Solvoy, did you have an opportunity to have a conversation with Mr. Krafka?

A. Yes, I did.

Q. And can you tell us what that conversation was about? What happened in that conversation with Mr. Krafka and I think it was Mr. Lewis, wasn't it?

A. My conversation or what it was leading up to that conversation?

Q. Well, I want you to testify as to the conversation that you heard and the conversation that you actually had.

A. Mr. Krafka asked me a question regarding Mr. Flatt's accusation that I was refusing relay signals in order to proceed with our work, and which of course I denied it, and the engineer, Mr. Laidler, has backed that up, that I was in position.

Q. Mr. LaFontaine, I want you to testify as to the conversation.

A. Well, in the conversation I denied the accusations that Mr. Flatt said of me and that I wanted a hearing on this as quick as I could possibly have it, and he said there would be an investigation on it; that he would see about it.

Q. Now, was it your request for the investigation? You made

the request for the investigation?

A. Yes, I did.

Q. That's what Mr. Krafka testified to?

A. Yes.

Q. Now, do you have an opinion as to whether or not Mr. Flatt was disappointed at the outcome of this conversation?

A. I thought he was very much so. He thought that Mr. Krafka was going to pull me out of service on his accusations alone.

Q. Following the conversation with Mr. Krafka, did you return to your work?

A. Oh, yes, we proceeded on with our work because Mr. Flatt got in the proper position and did his work according to the way we should have done it in the first place.

Q. Did you have any conversations with Mr. Flatt for the rest of your tour of duty on this particular day?

A. No, I didn't have to because everything was done with arm signals and I knew that work good enough where we wouldn't have to have anything verbally said to one another.

Q. Now, do you recall approximately what time you finished work?

A. I believe it was about 20 minutes to eleven.

Q. And when you tied up on that evening, what did you do after you tied up, after you put the engine into the track?

A. The yardmaster told us to tie up and I proceeded on to the office where we fill out our slips and where we can wash our hands and our lockers are at.

Q. On your way to the office, did you see Mr. Flatt?

A. Yes, I did.

Q. What did you see? Where did you see Mr. Flatt and what, if anything, was he doing at that point?

A. He was at his car and the car was parked at a right angle to the ice dock and he was bending over, putting a box of paraphernalia, hanging utensils, coffee pot,—I observed him then doing that.

Q. You indicated he was putting a box. Where was he putting the box?

A. In the rear seat of his automobile.

Q. Do you recall what make and model his automobile was?

A. A Chrysler. It was a four-door Chrysler, green I believe it was.

Q. Do you recall whether or not he was putting it in the back seat or the front seat, if you recall?

A. No, I don't recall if it was the front or back.

Q. Then what happened?

A. I continued on to the basement and went in immediately into the wash room and washed my hands, when Mr. Flatt called out to sign my name on the time slip, which I walked out and did.

Q. Now, did you get to the basement before Mr. Flatt or did Mr. Flatt get to the basement before you did?

A. I got there before him. He was still at the car.

Q. Do you recall whether or not Mr. Laidler was present in the basement at that time?

A. Yes, he was there. At the time Mr. Flatt called out to me?

Q. Yes.

A. Yes, he was there.

Q. Do you recall whether or not he got there before you or after you?

A. After me.

Q. Do you know whether he got there before Mr. Flatt or not?

A. No, I don't.

Q. But you do know that when you were asked to sign on the time sheet, Mr. Flatt was there?

A. Yes.

Q. Now, after signing the time sheet,—I am sorry, let me rephrase that question—ask a different question. During the time that you were in the basement, were there any

words between yourself and Mr. Flatt, other than the discussion about signing on the time sheet?

A. None whatsoever.

Q. After you signed the time sheet, what did you do?

A. Mr. Flatt walked out ahead of me and naturally I walked out behind him, because we were both done with what we were supposed to be doing and our cars were out in the parking lot. So, we headed out that way. I happened to be two or three paces behind him at the time.

Q. I am going to show you a document, which has been labeled Carrier's Exhibit Number 4.

MR. REOSTI: I will show this to the Board so that they know—so there is no misunderstanding about what I am showing Mr. LaFontaine.

For the record, this is the photocopy of the exhibit that the carrier introduced at the investigation and also submitted at the original Public Law Board Hearing.

Q. (By Mr. Reosti): Now, I'm going to ask you where, in your estimate, Mr. Flatt's car was in relationship to the Rougemere Office?

A. It was roughly at this—maybe one, two, three car parking spaces from the Fruit Growers Express Office.

Q. You are pointing to something which is on this document and you have pointed to something which is where the "foot" in 120 feet is actually written in the document?

A. I don't mean that at all. I mean in relation to the Fruit Growers Express Office is where the car would be parked.

Q. Let me rephrase this question. If the distance on this exhibit, from the Rougemere Office to the square on the right of the exhibit, which is denoted "J. H. Flatt Automobile" and is represented as 120 feet, was in fact 120 feet, on this line representing 120 feet, where would you place Mr. Flatt's automobile.

A. In feet?

Q. Yes.

A. Thirty-five, 40 feet at the very most.

Q. Now, were you present in the parking lot last week when Mr. Laidler was present in the parking lot?

A. Yes, I was.

Q. And did Mr. Laidler indicate to you and to I where he thought Mr. Flatt's automobile was?

A. Yes, he did.

Q. And where did he state that he thought Mr. Flatt's automobile was?

A. At the same spot that I indicated it was.

Q. Now, this exhibit also indicates a square on the bottom of the page, which is denoted as "R. LaFontaine's automobile," and do you agree that that is where your automobile was?

A. No, I don't. I never did.

Q. Where do you think your automobile was?

A. Right there. This X represents where it should have been.

Q. If we say that the bottom of this picture is Ferney Street and that the street running alongside of the Rougemere Office or on the left side of this exhibit was Industrial Street, how many car widths or parking spaces from Industrial west on Ferney would your car have been?

A. Well, at that time they didn't have parking spots next to Industrial. There was an approach there. I mean it started further west, but in relation to what you said, I would say maybe 12, 13 car lengths from Industrial.

Q. Let me rephrase the question. From the point in the parking lot where cars facing Ferney began to park in the easterly most part of the parking lot, that is the area near the Rougemere Office, how many parking spaces down, west on Ferney, was your car?

A. Seven. I would say around seven car lengths.

Q. And in your estimate, that would have been where there is an X on this particular drawing?

A. Yes.

Q. I'm going to show you a copy of Plaintiff's Exhibit Number 1 and ask you whether or not the figure identified as Figure C, which is on the bottom of this exhibit, whether or not that represents the area in which you think your car was parked?

A. Yes, it is.

Q. And that corresponds to the X on Carrier's Exhibit 4 that you stated would mark the spot of your car?

A. Yes.

Q. And would you indicate that the squares A and B on the top of the page are approximately where Mr. Flatt's car was?

A. Yes.

Q. Now, what would have been your normal course of going to your car?

A. Diagonally from the basement.

Q. Now, is it true that there are spaces for parking in the middle of—in a row which is in the middle of the parking lot? Is that true?

A. Yes.

Q. Do you recall whether or not there were cars parked there that evening.

A. Very few.

Q. Now, you indicated that you left the basement following Mr. Flatt. What happened next?

A. Well, as we were—I was walking towards my car. He was walking towards his car. He turned his head to me and asked me when the hell am I going to start doing some work on the job. So, I followed him to the car, which I never denied in the first place, to get this out in the open and talk it over with him regarding the work that was being done on our job.

Q. How far did you have to go out of your way to get to his car?

A. Well, I was walking in a diagonal manner through the park-

ing lot. I would have to walk maybe 15, 20 feet at the most.

Q. When you got to his car, what happened?

A. Well, he stopped and I stopped and I started—we started talking over the disagreements that we had on the job.

Q. And how long did that conversation last all tolled?

A. I would say four minutes.

Q. During the conversation, where were you in relationship to the car?

A. I was standing next to his car, leaning up against it, talking to him, at the rear quarter panel.

Q. Did you have anything in your hand?

A. No, I set my lamp and my gloves—well, part of my stuff, my lamp and my gloves,—I set my lamp and my gloves at the back of his trunk because they were uncomfortable and I felt as though I would set them down.

Q. When you had your lamp and your gloves on the back of the car, were you still leaning on the car?

A. Yes, I was in an easy manner, where I was trying to steady myself while I was talking.

Q. You were resting on the rear quarter panel?

A. Yes, leaning up against it.

Q. Now, at anytime during the conversation, did Mr. Flatt get any of his body into his car?

A. I think he was bending over into the rear seat talking or doing something. I don't know what he was doing while I was standing there leaning against the car.

Q. While you were there, would there have been anything to prevent Mr. Flatt from getting into the car?

A. None whatsoever. He could have gotten in and driven away any time he felt like it.

Q. While you were present talking to Mr. Flatt, did Mr. Laidler come by?

A. Yes, he walked by maybe two, three minutes later while we were standing there talking.

Q. Did you see Mr. Laidler before he spoke to you?

A. I heard him. I observed him and heard him walking. I was facing him. When he was walking that way, I was leaning against the car.

Q. And do you recall what he said?

A. He said good night to us and I said good night, Carl, and he went on to his car and his car was parked down maybe two car lengths, two or three car lengths. It was a few feet down further on the same side.

MR. REOSTI: Now at this point I would make an offer of proof as to what Mr. Laidler would testify to if he were called in. My offer of proof is that Mr. Laidler would testify that when he walked by, he saw Mr. LaFontaine lounging or leaning against the rear quarter panel and that at that point in time he noticed Mr. Flatt leaning into his automobile with the door open. The offer of proof does not include specification as to whether it was the back door or the front door or whatever. That completes the offer of proof as to what he would testify to.

Q. (By Mr. Reosti): During the conversation, was profanity used?

A. Yes.

Q. Is profanity used—let me rephrase that question. Can you think of a day in which you have worked on the railroad where profanity wasn't used?

A. Never.

Q. Were your voices loud?

A. Never. Not once.

Q. Were you aware of Mr. Roberts' presence in the parking lot?

A. No, I wasn't.

Q. Would you say that your conversation with Mr. Flatt was friendly?

A. No, it wasn't friendly, no. It was firm to the point of what was going on on the job.

Q. Did you threaten him?

A. No, I never threatened him, no.

Q. What happened?

A. What happened—in other words, you mean what conversation took place?

Q. Yes, what conversation took place prior to the—

A. I was trying to straighten out the way he was running the job. I was asking him why for weeks at a time that we were working short handed and we started, I believe at that time, at 2:30 in the afternoon and we would work short handed until 5:30, 6:00 o'clock. We would not pick up the fieldman, until around that time, on Jefferson Avenue and at this time he would come in drunk, and bring whiskey, beer and food for Mr. Flatt and I told him that I was tired of it and I was afraid that we were going to have an accident by shoving across crossings all the time. We had to set off the D.T. & I. and we had to shove across crossings, around curves and I was afraid that we were going to—we were out of sight at different times and that I was trying to get it across to him that this going to have to come to a halt.

When I told Mr. Flatt that this shit is going to have to come to a halt, when I said that it is coming to a halt, he brought an ice pick out in a fashion that I did not see. He did not raise his arm to stab me. He pulled it out in a horizontal movement from his coat pocket, where he had his hand all the time, and stabbed me in the left side. It went through my lung, through my colon and nicked my heart.

Q. Actually, when he first hit you, you didn't know that you had been stabbed, right?

A. No, I didn't.

Q. So all you knew was a blow?

A. I felt a blow and the impact.

Q. Now, just prior to being struck, can you recall where your hands were?

A. Along my side.

Q. Did you make any—where were your gloves at this point?

A. On the back of his trunk.

Q. Where was the lantern?

A. On the back of his trunk.

Q. Did you make any—offer anything that could have been construed as a threat or a movement, which suggested that you were going to hit him?

A. None whatsoever.

Q. How far apart were you when this happened?

A. Where two people would actually stand when they were in a natural conversation.

Q. That does not tell me anything.

A. I would say 15 inches, arms length.

Q. Now, were you able to smell Mr. Flatt's breath?

A. Oh, yes.

Q. Do you have any opinion as to whether or not Mr. Flatt had been drinking alcoholic beverages that evening?

A. None whatsoever. He was drinking every day.

Q. I am asking you about that evening.

A. Yes, he was drinking, yes.

Q. Did you smell the odor of alcohol on his breath?

A. Yes.

Q. Do you know why Mr. Flatt stabbed you?

A. No, I never knew why he stabbed me.

Q. Had you gotten along with Mr. Flatt in the past?

A. No.

Q. Had you ever had a physical confrontation with Mr. Flatt in the past?

A. Yes.

Q. What was that about?

A. Arm wrestling. He thought he could pull my arm down, wrestling, numerous times and I would pull him down like

he was nothing and I guess that hurt his ego. I don't know.

Q. Other than arm wrestling—by the way, with regard to the arm wrestling, whose suggestion was that that you arm wrestle?

A. His.

Q. Other than arm wrestling, did you ever have a physical confrontation with Mr. Flatt?

A. Physical, no. None whatsoever.

Q. You had earlier disagreements about the work?

A. Yes.

Q. Other than disagreements about the work, did you have any other confrontations with Mr. Flatt?

A. Yes, he would always belittle me. You know, he was an arrogant and caustic type of individual. He would make remarks, you know, to me and I would put them down, respond to his arrogance, verbally that is.

Q. Now, you have indicated that you had some disagreements with regard to the fieldman?

A. Yes, Roberts.

Q. Right. Why don't you just describe that, just to get it out?

A. The disagreement with him?

Q. The disagreement as to how the fieldman was working on the job.

A. I believe I said it before, that he wouldn't be coming in until 5:30, 6:00 o'clock. We would pick him up on Jefferson Avenue. He would be liquored all up and, in fact, by that time all of the most dangerous work was all over. We would have made the cutoffs and shoves over crossings and he was getting away with it because he was bringing whiskey and beer and food on the job. This went on for weeks and I just got tired of it. I thought it was time for everything to come to a close.

Q. When Mr. Krafka came to the Solvoy site at five o'clock on April 26th, was there any discussion about Mr. Roberts doing his share of the work?

the investigative notes of the company police for the purposes of showing the demeanor of the parties, Mr.LaFontaine, and the location of the automobile, Mr. Flatt's automobile, and the location of the lantern, where the lantern was found. Am I correct?

MR. REOSTI: Yes.

MR. SEMPLINER: We wish to have an executive session of the Board to decide this issue. Could we take a five minute recess for the Board to have an executive session.

(Whereupon a recess was held.)

MR. SEMPLINER: Let the record show that the Board has met in executive session and that we have considered the various matters brought up, including the offers of proof by Mr. Reosti; that if engineer Laidler were present that he could testify as to the demeanor of the parties in showing that it was cordial. He could testify as to the location of the auto, showing that there was a variation between that presented to the Board at the hearing and presently; that Mr. Cunningham might be able to testify as to where the lantern was eventually found after the altercation in the parking lot. The Board is unsure if the transcript shows this or not; that if they had the investigative notes of the carrier's officers or the Dearborn Police Department, they might also show as to where the lantern was found.

The Board is of the opinion that these offers of proof are not greatly material to the decision to be rendered in this case and that therefore they will deny that these additional witnesses be heard before the Board.

If there is nothing further to be presented by either side then, other than new witnesses, we will hear argument or briefs, if desired, and give sufficient time to submit briefs if it is requested. Otherwise, the matter is closed.

Is that correct, Mr. Schuler?

MR. SCHULER: Yes, I think so.

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss

I, Donald R. Henry (R-2098), do hereby certify that I reported stenographically the proceedings had and testimony taken in the above-entitled matter before the Public Law Board, at the time and place hereinbefore set forth, and I do further certify that the foregoing transcript is a true and correct transcript of my said stenograph notes.

DONALD R. HENRY

Donald R. Henry (R-2098) Notary Public
Wayne County, Michigan
My commission expires: August 29, 1982

A. Yes, I believe I had mentioned it, yes.

Q. Were you looking forward to the investigation?

A. Yes, I was, because I knew I could prove it very readily.

MR. REOSTI: If the Board just gives me a minute to review my notes, I think that's all the questions that I have.

That's all the questions I have. I just want to, for the record, make it clear that the only reason that I wanted the testimony of Mr. Cunningham and the investigative notes is that it is my belief, based on my investigation, I very strongly believe that the investigation conducted by the Dearborn Police, that the evidence will substantiate the proposition that Mr. LaFontaine's lamp was recovered on the trunk lid of Mr. Flatt's car. That is something which does not come out at the investigation. In fact, I have read the transcript, I think, carefully and I can find no reference in the transcript as to where the lantern was when it was recovered. All we can tell from the transcript is that it was recovered and introduced into evidence, but who picked it up out of the parking lot or where they found it, if one reads the transcript, is a mystery. My investigation leads me to believe that it was in fact found on the trunk lid and that we can establish that through the testimony of Mr. Cunningham and the investigative notes.

MR. SEMPLINER: We will take a five minute recess.

(Whereupon a recess was held.)

MR. SEMPLINER: Mr. Kelly?

MR. REOSTI: I just want to make one statement for the record, with regard to Plaintiff's Exhibit Number 1. I have indicated that it is an offer of proof and I think that Mr. Laidler's testimony would substantiate it and I also want to indicate that, as I have outlined in my submission that it is our contention that there is additional testimony in the transcript, if the transcript were to be relied upon, which would substantiate this exhibit and that would be the testimony of Conductor Sharran—yardmaster Sharran

and also the testimony of Roberts, Cliff Roberts, although it does not indicate the distance from Industrial, the testimony does indicate that Flatt's car and LaFontaine's car were on a straight line perpendicular to Ferney.

That's all. I am sorry for the interruption.

CROSS EXAMINATION

BY MR. KELLY:

Q. Mr. LaFontaine, the transcript in this case shows that Cunningham and Laidler and others were at this hearing. It also shows that you were represented by an individual and then you took over your own case. Were you or your representative allowed to question these witnesses?

MR. REOSTI: I object. The transcript speaks for itself.

MR. SEMPLINER: Objection sustained. The transcript does show what happened and the questions of the witnesses.

MR. KELLY: No further questions.

MR. SEMPLINER: Have you any questions?

MR. SCHULER: I have no questions.

MR. WOTASZAK: I have no questions.

MR. SEMPLINER: Mr. LaFontaine, you have related to the Board certain comments about the work of Mr. Roberts. Did you ever make any complaints of this to the carrier?

A. I never complained about anybody's work. I wasn't that type of person to do that.

MR. SEMPLINER: But you made that complaint to Mr. Flatt about Mr. Roberts?

A. Only at the confrontation of that evening, yes.

MR. SEMPLINER: But never before this?

A. Oh, yes. Yes, we had arguments about it, yes, what was going on on the job, yes, just talking back, between one and another.

MR. SEMPLINER: You never made complaints to the yardmaster?

A. No.

MR. SEMPLINER: The trainmaster?

A. No, I never went to the yardmaster or trainmaster for any reason like that.

MR. SEMPLINER: At the time of the trainmaster's investigation, you were represented by Mr. Wheatley and Mr. Lewis. Were those men of your choice at that time?

A. Well, yes. At the beginning, yes, but I have to indicate that only Mr. Lewis was representing me at the beginning of the hearing, doing the talking.

MR. SEMPLINER: At the time that you answered the questions and you were represented by these two gentlemen, you knew that they were also representing Mr. Flatt?

A. Yes. At the investigation I did, but I thought maybe they would have somebody from—you know, I didn't know until that very day that I walked in that that was going to be the procedure of my defense. I asked for Mr. Wotaszak to represent me, but I think—I believe this was declined.

Is that true?

MR. WOTASZAK: I don't recall a request that I personally represent you at the time, but I do recall some discussion with Mr. Wheatley and Mr. Lewis as to how to conduct it because we had two parties involved. It was my understanding that one was going to represent one party and one was going to represent the other party. However, it wasn't decided by myself as to who would represent who at the hearing.

THE WITNESS: And I didn't know that until they started the hearing.

MR. SEMPLINER: And Mr. Wotaszak, at the time you were acting chairman of the committee? Is that correct?

MR. WOTASZAK: Yes, sir. I was general chairman of the committee for C & O North at the time.

MR. SEMPLINER: Getting back to the original hear-

ing before the Public Law Board 347, which resulted in an award, had you ever discussed this matter with Mr. Wotaszak or Mr. Burt?

A. On the Public Law Board decision?

MR. SEMPLINER: Yes, award number 120, which came down in 1973, January 11th.

A. Did I discuss it with Mr. Wotaszak?

MR. SEMPLINER: Between the investigation and the Trainmaster's Hearing and the time that it was argued before the Public Law Board?

A. I believe I did talk to him, yes.

MR. SEMPLINER: I have nothing further. Is there anything further that you have?

MR. REOSTI: Just one question.

REDIRECT EXAMINATION

BY MR. REOSTI:

Q. You have just testified that you never made a complaint about Mr. Roberts. When you had requested the investigation from Mr. Krafka earlier in the day and he said yes, we will have an investigation, was it your hope that would solve the problem?

A. Yes, I felt that it would all come out and I could prove it, what they were doing on the job.

MR. REOSTI: I have nothing further.

MR. SEMPLINER: Anything further, Mr. Kelly?

MR. KELLY: No.

MR. SCHULER: I have nothing further, other than I think to clarify one point in my mind.

You made reference to an individual that you would like present to give testimony, whose name wasn't included in your September 12th letter, Mr. Reosti, a letter to Mr. Sempliner.

MR. REOSTI: That is correct.

MR. SCHULER: I had wondered if, for the record, for our consideration, if you will state once and for all just whom you are asking the Board to bring forward so that you can question them. If you list them, please?

MR. REOSTI: Carl Laidler, who was the engineer and who I think, really undisputedly, walked by the Flatt automobile shortly before the stabbing and who would testify as to where the location of where Mr. Flatt's automobile was and also as to the demeanor of both Mr. Flatt and Mr. LaFontaine shortly before the stabbing, Mr. LaFontaine being stabbed.

Mr. C. E. Cunningham, who was the trainmaster and I think still is the trainmaster. He was the trainmaster at the time, on that evening, who was not a witness to the actual events, but who, it's my understanding, did have information or at least did have information as to how and where Mr. LaFontaine's lamp was when it was recovered, and in addition, I am requesting the investigative notes prepared by officers Cordello and Washington, as well as any notes made by carrier officials, that is non-union people, who were on the premises that evening and who made reports concerning the incident.

Again, it is my contention that that will indicate that Mr. LaFontaine's lantern was on the trunk of the car and no where near the spot that it would have had to have been had Mr. Flatt's testimony had the least semblence of veracity.

MR. SEMPLINER: So, those are the three items?

MR. REOSTI: The two witnesses and an item.

MR. SEMPLINER: Off the record.

(Whereupon an off the record discussion was held.)

MR. SEMPLINER: Back on the record.

Mr. Reosti has outlined the three offers of proof that is on the record, namely Mr. Laidler, the engineer; Mr. Cunningham, the assistant yardmaster and trainmaster; and

MR. WOTASZAK: Yes.

MR. SEMPLINER: Mr. Reosti, do you wish to make a statement now or do you wish to submit it in writing in a brief?

MR. REOSTI: Well, I have submitted a claim or made a submission in writing, which is supported by exhibits and an affidavit, and the only thing I would like to do is, to the extent that the railroad is going to make a submission in writing which I haven't seen, is to have an opportunity to respond to that in writing.

MR. SEMPLINER: You will have two weeks from the time the railroad submits their brief. You will be limited, if you don't take your initial opportunity, to what is in their brief, the matters they cover in their brief and I will give the railroad—

Today is the 19th, how much time would you like, Mr. Schuler?

MR. SCHULER: Thirty days.

MR. SEMPLINER: All right, 30 days to submit theirs, which would be on the 19th of October.

MR. REOSTI: Then I will have two weeks following that?

MR. SEMPLINER: Two weeks after that and in view of the 30 days, I think I will give you three weeks to respond to that.

The matter is heard in conclusion.